No. 09-16246 & 10-13071

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELOY ROYAS MAMANI, *et al.*,
Plaintiffs/Appellees,

v.

JOSE CARLOS SÁNCHEZ BERZAÍN AND GONZALO SÁNCHEZ DE LOZADA SÁNCHEZ BUSTAMENTE
Defendants/Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA
HON. ADALBERTO JORDAN, J., JUDGE
Case No. 07-22459 & 08-21-63

BRIEF OF *AMICUS CURIAE* EARTHRIGHTS INTERNATIONAL IN SUPPORT OF PLAINTIFFS-APPELLEES' PETITION FOR REHEARING AND REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Cir. R. 26.1-1, Amici hereby submit their Certificate of Interested Persons:

A. TRIAL JUDGE & MAGISTRATE JUDGE

The Honorable Adalberto Jordan, United States District Court, Southern District of Florida

Magistrate Judge Chris Marie McAliley, United States District Court, Southern District of Florida

B. PLAINTIFFS-APPELLEES

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Bernabe Callizaya, Hermogenes (Appellee)

Espejo Villalobos, Sonia (Appellee)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 *amicus curiae* EarthRights International submits its Corporate Disclosure Statement as follows: *Amicus* does not have a parent corporation nor is there a publicly held corporation that owns 10% or more of its stock.

STATEMENT OF COUNSEL

Pursuant to 11th Circuit Rule 35-5(c), I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

> Whether the panel endorsed the correct legal standards that apply to crimes against humanity, but proceeded to undermine those very standards and contravened circuit precedent by conflating the "widespread" and "systematic" prongs of the standard, ignoring universally accepted indicia of systematicity, and establishing an arbitrary numerical threshold for the number of victims required to constitute crimes against humanity that may well exclude claims this and other federal circuits have previously recognized.

/s/ Marco Simons

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae EarthRights International (ERI) is a non-profit human rights organization based in Washington, D.C., that litigates and advocates on behalf of victims of human rights abuses worldwide. ERI is or has been counsel in several cases in which the application of the legal standard for crimes against humanity claims has been litigated, including most recently, *In re Chiquita Brands International, Inc. Alien Tort Statute and Shareholder Deriviative Litigation*, No. 08-01916-MD (S.D. Fla.). ERI has a substantial interest in assuring the uniform and correct application of the settled legal standard for crimes against humanity, especially in this Circuit.

STATEMENT OF ISSUE FOR EN BANC DETERMINATION

> Whether the panel endorsed the correct legal standards that apply to crimes against humanity, but proceeded to undermine those very standards and contravened circuit precedent by conflating the "widespread" and "systematic" prongs of the standard, ignoring universally accepted indicia of systematicity, and establishing an arbitrary numerical threshold for the number of victims required to constitute crimes against humanity that may well exclude claims this and other federal circuits have previously recognized.

SUMMARY OF ARGUMENT

The panel's decision affirmed the universally agreed legal standard for crimes against humanity, but erred by failing to apply that definition consistent with circuit precedent or with federal and international law. The panel agreed that certain acts – including murder – may be actionable as crimes against humanity (CAH) when

[1] No counsel for a party authored this brief in whole or in part, and no persons other than *amicus* or its counsel made a monetary contribution to this brief's preparation or submission.

committed as a result of a widespread or systematic attack against a civilian population, but then improperly conflated the "widespread" and "systematic" prongs, reducing both to a simple body count and deciding that 67 deaths were not sufficient.

In fact, federal and international law provide ample and universal support for the notion that the "widespread" and "systematic" inquiries are distinct from each other, and constitute a disjunctive requirement. *Either* a widespread *or* a systematic attack is sufficient for crimes against humanity; an attack need not be both systematic and widespread. A systematic attack is one that is organized and planned; the attack may even be systematic if it claims only one victim, so long as it is planned and directed to target a civilian population. Because it focused solely on the number of victims –a statistic that is irrelevant to systematicity –the panel ignored allegations demonstrating a number of undisputed indicia of a systematic attack, including the existence of a pattern and repetition in the targeting of victims, policy coordination at the highest levels, and the decision to expend state resources.

The panel also erred in its determination that the attack was not sufficiently widespread. Although this inquiry, unlike the systematicity inquiry, does relate to the magnitude of the attack, reliance on a simple body count is improper; instead, the "means, methods, resources, and result" of the attack are relevant. Moreover, both international and federal tribunals have recognized CAH in attacks that claimed fewer victims than the one at issue here. The leading case in this very circuit, *Cabello v. Fernandez Larios*, involved an attack that killed 72 persons; in effect, the panel's

reasoning would arbitrarily establish a threshold between 67 and 72 victims, rather than employing the proper, fact-intensive analysis. For this reason, simple body counts are disfavored, as they tend to diminish the value of the victims and entail line-drawing that would lead to absurd results.

ARGUMENT

I. The *Mamani* panel stated the correct standard for crimes against humanity but failed to adhere to that standard.

The *Mamani* panel was correct when it affirmed that crimes against humanity (CAH) "may give rise to a cause of action under the ATS." *Mamani v. Sánchez Berzaín*, No. 09-16246, 2011 WL 3795468 (11th Cir. Aug. 29, 2011)(henceforth "*Mamani*") at*3. That certain acts committed "as a result of 'widespread or systematic attack' against civilian populations" are actionable under the ATS as CAH is not in dispute.[2] *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1252 (11th Cir. 2005); *accord Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005); *United States v. Yousef*, 327 F.3d 56, 106 (2d Cir. 2003); *Abagninin v. AMVAC Chem. Corp.*, 545 F.3d 733, 741 (9th Cir. 2008).

The *Mamani* panel fundamentally erred, however, when it stated the correct

[2] Every court to consider the issue since *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) has found that CAH is actionable under the ATS. *See Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1154 (11th Cir. 2005); *Aldana v. Del Monte Fresh Produce N.A., Inc.,* 416 F.3d 1242, 1247 (11th Cir. 2005); *Doe. V. Saravia*, 348 F. Supp. 2d 1112, 1154-1157 (E.D. Cal. 2004); *Doe v. Liu Qi*, 349 F. Supp. 2d 1258, 1308 (N.D. Cal. 2004); *Mujica v. Occidental Petroleum Corp.,* 381 F. Supp. 2d 1164, 1183 (C.D. Cal. 2005).

standard for CAH, *id.* at *6, but failed to apply it. The panel recognized that CAH occur as a result of a "widespread *or* systematic" attack, acknowledging that "widespread" and "systematic" are alternative, *not* cumulative, qualifiers. *Mamani* at *6. It is thus confounding that the panel then proceeded to analyze the sufficiency of the *Mamani* plaintiffs' allegations under the "widespread" prong alone, effectively disregarding the availability of the systematic prong. *Mamani* at *6.

Under both ATS case law and international law, the qualifiers "systematic" and "widespread" are stated in the alternative. For CAH, an attack must be widespread *or* systematic; it need not be both widespread *and* systematic. *Aldana*, 416 F.3d at 1247; *Prosecutor v. Kordic/Cerkez*, Case No. IT-95-14-2-T, Judgment ¶178 (Feb. 26, 2001) ("The requirement that the occurrence of crimes be widespread or systematic is a disjunctive one."); David Luban, *A Theory of Crimes Against Humanity*, 29 Yale J. Int'l L. 85, 108 (2004). The panel did not dispute this point; but it did fail to give it effect.[3]

A. A finding that the attack was not sufficiently "widespread" or numerous does not affect the availability of the "systematic" prong.

[3] It should be noted that the *Mamani* panel did not dispute the controlling law of this Circuit, upheld in both *Aldana* and *Cabello*, that when a defendant has committed certain prohibited acts "as a result of 'widespread or systematic attack' against civilian populations," this alone is sufficient for liability for CAH. The panel's gloss on this definition – that "crimes against humanity exhibit especially wicked conduct that is carried out in an extensive, organized, and deliberate way, and that is plainly unjustified," *Mamani* at *6 – cannot provide a basis for the panel's failure to apply the standard to the facts at issue; the panel could not have meant for this language to limit in any way the definition set out in *Aldana* and *Cabello*, because to do so would be stepping beyond the authority of a three-judge panel, and in any event would be unsupported by any ATS case law or international law source.

Neither international law nor federal case law require a minimum quantitative threshold of violent acts before a crime may be considered a CAH. *Prosecutor v. Blaškic*, Case No. IT-95-14, Judgment ¶ 207 (Mar. 3, 2000) ("neither international texts nor international and national case-law set any threshold starting with which a crime against humanity is constituted."). The result is that, even when the total number of deaths or injuries involved is quite small, wrongful acts can constitute CAH if they are sufficiently systematic and they are committed against a civilian population. *See, e.g.,* Steven R. Ratner & Jason S. Abrams, *Accountability for Human Rights Atrocities in Int'l Law: Beyond the Nuremberg Legacy* 60 (1997).

Because systematicity refers to the "element of coordinated planning," systematicity can exist "even if the attack succeeds in harming only one person." Luban at 167. *See also* Jordan J. Paust *et al.*, *International Criminal Law* 30, 33-35 (3d ed. 2007) at 745 ("even under more restrictive definitional orientations convictions of persons for crimes against humanity have occurred when as few as 1, 3, 7, 11, 30, or 44 direct victims had been targeted."). A single murder can serve as the predicate for CAH even when no other deaths occur in the larger attack. This can be true when the murder systematically targets an entire population.

According to some international law scholars, this was the case in one of the earliest examples of a recognized CAH: the execution of Hungarian leader Imre Nagy by Soviet authorities in 1956. Ratner & Abrams at 60. There, Ratner and Abrams explain that, although only one life was taken, "the target 'against' whom the action

[wa]s committed was more than the victim himself," it was the larger civilian population, and the attack was systematic "insofar as it [wa]s meant to intimidate the entire civilian population."). *Id.* Thus a crime or crimes may be sufficiently systematic to constitute CAH *independent* of their numerosity. This is so because the terms "widespread" and "systematic" refer to different metrics, and involve two separate inquiries. A finding of one does not determine, or exclude, the finding of the other.

B. The "systematic" prong asks different questions, and merits a different analysis, than the "widespread" prong.

When a court asks whether an attack has been "widespread," it inquires into scale. Conversely, when a court considers whether the attack has been "systematic" it focuses on the method of the attack. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 670 (S.D.N.Y. 2006), *aff'd,* 582 F.3d 244 (2d Cir. 2009) ("A widespread attack is one conducted on a large scale against many people, while a systematic attack is an organized effort to engage in the violence.")(internal citations omitted); *See also Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 275 (E.D.N.Y. 2007); *Prosecutor v. Rutaganda,* Case No. ICTR-96-3-T, Judgment ¶ 69 (Dec. 6, 1999).

Under customary international law, the phrase "systematic" refers to the "organized nature of the acts of violence and the improbability of their random occurrence. Patterns of crimes, in the sense of the non-accidental repetition of similar criminal conduct on a regular basis, are a common *expression* of such systematic occurrence." *Prosecutor v. Blaškic,* Case No. IT-95-14-A, Appeal Judgment ¶ 101 (July

29, 2004) (emphasis added). The repeated nature of the crime is thus a manifestation of systematicity, but it is not a requirement. If it were otherwise, the "widespread" and "systematic" prongs, which are disjunctive, would be folded into the same inquiry.

That a crime may be "systematic" although it only takes one person as its victim does not render the "systematic" prong meaningless. A crime may be isolated, but it is the organized nature of its commission, i.e. the systematicity, that indicates that the crime is not random, but part of a greater campaign. It is this greater campaign to engage in violence directed at civilians that is of concern to international tribunals prosecuting CAH, and these tribunals have developed considerable jurisprudence giving content to the meaning of systematicity.

The ICTY Trial Chamber, in particular, has provided considerable guidance on the meaning and content of the "systematic" prong. In *Blaškic*, the ICTY Trial Chamber proposed four considerations as reference points for analyzing the "systematic character" of CAH:

- the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community;
- the perpetration of a criminal act on a very large scale against a group of civilians *or* the repeated and continuous commission of inhumane acts linked to one another;
- the preparation and use of significant public or private resources, whether military or other;
- the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan.

Blaškic, No. IT-95-14 at ¶ 203 (emphasis added).

Other courts have used similar indicia to emphasize that systematicity can be demonstrated by organized action, a pattern of violence, and an outlay of public or private resources (including military forces). *See Almog*, 471 F. Supp. 2d at 260; *Wiwa v. Royal Dutch Petroleum Co.*, 96 CIV. 8386 (KMW), 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002); *Rutaganda*, No. ICTR–96–3–T at ¶ 68 (agreeing that "systematic" meant "thoroughly organised action, following a regular pattern on the basis of a common policy and involving substantial public or private resources" and stressing that "it is not essential for this policy to be adopted formally as a policy of a State. There must, however, be some kind of preconceived plan or policy.").[4]

Because the existence of a plan need not be official or explicitly adopted as a state policy, it "may be surmised from the occurrence of a series of events." *Blaškic*,

[4] It is important to emphasize that, although an official state policy may serve as evidence of a "systematic" attack, it is by no means required. *Blaškic*, No. IT-95-14 at ¶ 204 (clarifying that although the *implementation* of an official plan or policy *could result* in the repeated or continuous commission of inhumane acts, a "plan, however, need not necessarily be declared expressly or even stated clearly and precisely"). This is in accord with the principle, long recognized by both U.S. federal courts and international tribunals, that it is not only state actors, but also private actors, who can be liable for CAH. *See Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995) (holding that "Karadzic may be found liable for genocide, war crimes, and crimes against humanity in his private capacity ..."); *See also* Jennifer M. Smith, *An International Hit Job: Prosecuting Organized Crime Acts as Crimes Against Humanity*, 97 Geo. L.J. 1111, 1126-28 & nn.148-149 (2009) (finding that national courts and the ICTY have "recognized that private actors could commit crimes against humanity[,]" and state policy is not required; citing *Prosecutor v. Kunarac*, Case No. IT-96-23/1-A, Appeal Judgment (June 12, 2002)("explicitly held that a policy or plan is not even an element of crimes against humanity under customary international law ... other ICTY and ICTR judgments have consistently reaffirmed that a plan or policy is not a requisite legal element ... [listing 12 ICTY cases and 4 ICTR cases].").

No. IT-95-14 at ¶ 204. More specifically, a court could consider the following events or occurrences in assessing the organized nature of the attack: "the overall political background against which the criminal acts are set; . . . the general content of a political programme, as it appears in the writings and speeches of its authors; media propaganda; . . . the mobilisation of armed forces; temporally and geographically repeated and co-ordinated military offensives. . ." *Id.*

In sum, courts to consider the systematicity of CAH have thus emphasized the organized nature of the action taken, the pattern of violence evidencing a common plan, and an expenditure of public or private resources (including military forces).

C. The *Mamani* panel erred when it failed to meaningfully analyze the sufficiency of plaintiffs' claims that the attacks were "systematic" after determining that the attacks were not sufficiently "widespread."

Amicus is concerned that, despite the appreciable guidance that courts have provided as to the meaning of "systematic," the *Mamani* panel failed to conduct a separate analysis of plaintiffs' claims, inquiring into whether the deaths and injuries presented were sufficiently "systematic" in nature. Instead, the panel proceeded as though a finding of systematicity depended upon the number of deaths involved, rather than upon their systematic nature. The language used by the *Mamani* panel in its CAH analysis betrays this: the panel incorrectly used the "alleged toll" of deaths and injuries as its reference point for analyzing both the "widespread" and "systematic" prongs. *See Mamani* at *6 ("The *alleged toll* is sufficient to cause concern and distress. Nevertheless, especially given the mass demonstrations, as well as the threat to the

capital city and to public safety, *we cannot conclude* that *the scale of this loss of life and of these injuries* is sufficiently widespread—or *that wrongs were sufficiently systematic*, as opposed to isolated events (even if a series of them)—to amount definitely to a crime against humanity under already established international law.")(emphasis added).

Because the panel focused primarily on the "body-count" at issue, and conducted only a summary analysis of the systematicity of the attacks, the panel effectively collapsed the test for "systematicity" into the test for "widespreadness." This was in error. The effect of this was that the *Mamani* panel never meaningfully addressed plaintiffs' allegations showing evidence of systematic attacks. By focusing on the scale of the attacks alone, the *Mamani* panel proceeded as though a finding of a "widespread" attack was *necessary* for liability, when it is merely an alternative, *sufficient* basis. This method not only contradicts the *Cabello* standard that the panel purported to apply, but also has no basis in federal case law or international law.

II. *Mamani* plaintiffs' allegations were sufficient to meet both the "systematic" and the "widespread" prongs.

International law requires that courts adjudicating CAH claims consider the "means, methods, resources and result of the attack upon the population" to determine whether the attack was systematic or widespread. *Kunarac*, No. IT-96-23/1-A at ¶ 95. The panel erred by opting instead to rely chiefly on a body count, despite acknowledging that plaintiffs had advanced a number of allegations that would have allowed a full and proper analysis.

A. **Had the panel conducted the "systematicity" analysis properly, it would have found that *Mamani* plaintiffs' allegations tended to show that the attacks were sufficiently "systematic."**

Although the panel was presented with, and acknowledged, the existence of facts tending to demonstrate the organized and systematic nature of the attacks, the panel failed to analyze them under the "systematic" prong of the analysis at all. Had it done so, the panel could not have summarily disposed of plaintiffs' CAH claims.

The panel was on notice of alleged activity by Defendants demonstrating "the existence of a political objective, a plan pursuant to which the attack is perpetrated," *Blaškic*, No. IT-95-14 at ¶ 207. *Mamani* at *4 (plaintiffs alleged that defendants "met with military leaders, other ministers in the Lozada government to plan widespread attacks involving the use of high-caliber weapons against protesters."). The panel was also aware that Defendants "order[ed] Bolivian security forces, including military sharpshooters armed with high-powered rifles and soldiers and police wielding machine guns, to attack and kill scores of unarmed civilians." *Mamani* at *4.

Had the panel undertaken a proper analysis of the "systematicity" of the attacks at issue, it would have noted that plaintiffs alleged facts tending to show a "repeated and continuous commission of inhumane" shootings of civilians in their homes or in public spaces. *Blaškic*, No. IT-95-14 at ¶ 207. As the panel recognized, the attacks and killings were conducted over a period of two months in several towns, resulting in about 70 deaths and over 400 injuries. *Mamani* at *6. The panel was also on notice that these shootings were not random or incidental. *Mamani* at *4 (acknowledging

plaintiffs' allegations that defendants "knew or reasonably should have known of the pattern and practice of widespread, systematic attacks against the civilian population by subordinates under their command" and that the deaths occurred repeatedly at the hands of military sharpshooters with high-powered weapons).[5]

Finally, the panel recognized allegations that the defendants encouraged and committed resources for further attacks. *Mamani* at *4-5 (plaintiffs sufficiently alleged that defendants, *inter alia*, "ordered the mobilization of a joint police and military operation" and "authorized the use of 'necessary force' to reestablish public order" and that at least one defendant "accompanied military personnel in a helicopter from which shots were fired and directed them where to fire their weapons").

The *Mamani* panel erred when it failed to take *any* of these facts into account in its CAH analysis. Besides the body count, the only factor the panel considered was the fact that the deaths took place against the backdrop of demonstrations and a "threat to the capital city." *Mamani* at *6. *Amicus* is aware of no authority supporting the notion that an attack that would otherwise constitute CAH falls outside the definition if it occurred during a time of civil unrest. In contrast, as the Trial Chamber in *Blaškic* made clear, courts should take seriously those facts tending to show both "the existence of a political objective, a plan pursuant to which the attack is

[5] It should be noted that there is no requirement under customary international law that all of the attacks occur in an identical manner. *Prosecutor v. Kamuhanda*, Case No. ICTR-95-54A, Appeal Judgment (Jan. 22, 2004). Still, there was appreciable similarity between the killings of the victims in this case: unarmed civilians shot by military sharpshooters in their homes or fields in towns associated with political dissent.

perpetrated," and allegations that defendants have expended "significant public resources," in particular, military resources, in carrying out campaigns to weaken civilian populations. *Blaškic*, No. IT-95-14 at ¶ 207. Had the *Mamani* panel conducted a proper analysis of the "means, methods, resources and result of the attack upon the population" in determining whether the alleged attacks were systematic, it would have found all of these facts significant.

B. Had the panel conducted the "widespread" analysis properly, it would have found that *Mamani* plaintiffs' allegations tended to show that the attacks were sufficiently "widespread."

Not only was the panel's failure to apply the "systematic" prong of the CAH analysis to plaintiffs' claims in error, *Amicus* respectfully submits that the panel also erred in determining that the attacks were not sufficiently "widespread." In analyzing the widespread nature of the attacks, the panel stated that "fewer than 70 killed and about 400 injured to some degree, over about two months . . .is sufficient to cause concern and distress" but that ". . . we cannot conclude that the scale of this loss of life and of these injuries is sufficiently widespread." *Mamani* at *6.

In its analysis, the *Mamani* panel failed to recognize that other courts have, in fact, found fewer deaths and injuries to be sufficiently widespread so as to constitute a "widespread" attack for purposes of crimes against humanity. *See*, *e.g., Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1169, 1183 (C.D. Cal. 2005) (17 people were killed and 25 wounded by a single car bomb); *Almog* 471 F. Supp. 2d at 275 (a single act may qualify as a widespread attack if it is linked to other widespread attacks);

Prosecutor v. Tadic, Case No. IT-94-1-T, Judgment, ¶ 248 n.311 (May 7, 1997) (same). *See also Lizarbe v. Hurtado*, No. 07-21783, 2008 U.S. Dist. LEXIS 109517 (S.D. Fla. 2008) (involving the deaths of 60 persons); *Chavez v. Carranza*, 559 F.3d 486, 491 (6th Cir. 2009) *cert. denied*, 130 S. Ct. 110, 175 L. Ed. 2d 32 (2009) (6 deaths). Significantly, even the leading case in this Circuit outlining the standard for CAH, *Cabello* (the very case cited by the panel), involved the killing of 72 civilians. 402 F.3d at 1161.

It would be absurd to draw a line between 67 deaths and 72 deaths as a numerical threshold for CAH. For this reason, international law jurists, scholars and tribunals have long disfavored body-count requirements. *See* Luban at 108 ("Any body-count requirement threatens to debase the idea of international human rights and draw us into what I once called 'charnel house casuistry' – legalistic arguments about how many victims it takes; . . . to decline to prosecute a perpetrator because his attack on a civilian population had 'only' a few victims diminishes the value of the victims;" adding that such "questions about crimes against humanity are wrongheaded and even grotesque"). Simon Chesterman is likewise skeptical of what he calls "the gruesome calculus of establishing a minimum number of victims necessary to make an attack 'widespread.'" Chesterman, *An Altogether Different Order: Defining the Elements of Crimes Against Humanity*, 10 Duke J. Comp. & Int'l L. 307, 315 (2000).

Minimum body-count requirements are not only grotesque; they are also insufficient indicia for determining when CAH have been committed at all. Precisely because the question of whether an attack was "widespread" cannot be determined

with reference to numbers alone, courts should undertake a studied analysis of the "means, methods, resources and result of the attack upon the population" *Kunarac*, No. IT-96-23/1-A at ¶ 95. This question is, undoubtedly, a fact intensive one. As one prominent international jurist has commented, a trial for CAH at the ICTY "is usually more akin to documenting an episode or even an era of national or ethnic conflict rather than proving a single discrete incident." Patricia M. Wald, *To "Establish Credible Events by Credible Evidence": The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings,* 42 Harv. Int'l L.J. 535, 536-7 (2001).

The fact-intensive nature of claims for CAH counsels strongly against the type of summary analysis conducted by the *Mamani* panel. Not only was the panel's depth of analysis insufficient, it was also particularly inappropriate at this stage in the proceedings. *Amicus* respectfully submits that, when a court is uncertain as to whether the facts alleged by plaintiffs make a satisfactory showing that the attack or attacks were sufficiently widespread, this question is not one to be answered hastily at the pleading stage, or by an appellate panel on interlocutory appeal.

CONCLUSION

For the foregoing reasons, *amicus* respectfully urges this Court to grant the petition for panel rehearing or, in the alternative, for rehearing en banc.

Dated: September 28, 2011

Respectfully submitted,

/s/ Marco Simons

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CERTIFICATE OF SERVICE

I, Jonathan Kaufman, hereby certify that I am employed by EarthRights International at 1612 K Street NW, Ste. 401, Washington, DC 20006; I am over the age of eighteen and I am not a party to this action. I further declare that on September 28, 2011, the following submissions:

- Motion of *Amicus Curiae* EarthRights International for Leave to File Brief of *Amicus Curiae* in Support of Plaintiffs-Appellees

- Brief of *Amicus Curiae* EarthRights International in Support of the Petition for Rehearing and Rehearing En Banc

were dispatched to a third-party commercial carrier on September 28, 2011, for delivery to the Clerk on September 29, 2011. I further certify that a true and accurate copy of the Brief was served by the same means upon the following counsel of record:

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